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No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD SOMERVILLE and MARJORIE KULLERSTRAND,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 60618 LA 5-6581

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald Somerville and Marjorie Kullerstrand, hereby petition this court for a writ of certiorari to review the judgment of the Appellate Court of Illinois, First Judicial District, which affirmed the judgment of conviction of theft entered against them by the Circuit Court of Cook County, County Department—Criminal Division.

Opinion Below

The opinion of the Appellate Court of Illinois is reported at 88 Ill.App.2d 212, 232 N.E. 2d 115, and is attached hereto as Appendix A *infra.*

Jurisdiction

The judgment sought to be reviewed was entered on October 16, 1967. A timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on Jan. 17, 1968. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1257(3).

Question Presented For Review

Whether the Fifth Amendment prohibition against double jeopardy is applicable to the state and if so, were the petitioners unlawfully twice placed in jeopardy where after the jury was sworn to try the issues on a prior indictment for the same offense, the state moved for a mistrial on the grounds that the indictment was defective, the motion was granted over the objection of the petitioners and the state obtained the instant indictment upon which the petitioners were tried and convicted.

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; * * *.

Criminal Code of 1961, Section 3—4 (Ill. Rev. Stat. (1967), Chap. 38, Sec. 3—4):

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

* * *

(3) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

Statement of the Case

The petitioners were indicted by the grand jury of Cook County, Illinois, for the crime of theft, were found guilty by a jury and sentenced to the Illinois State Penitentiary for a term of not less than two nor more than ten years in the case of Donald Somerville, and placed on three years probation in the case of Marjorie Kullerstrand.

The indictment charged that on March 24, 1963, the defendant, Donald Somerville and Marjorie Kullerstrand committed the offense of theft in that they knowingly obtained unauthorized control over stolen property, to-wit: Thirteen Hundred Dollars in United States currency, the property of Zayre of Bridgeview, Inc., a corporation, knowing the said property to have been stolen by another, and intending to deprive said Zayre of Bridgeview, Inc., a corporation, permanently of the use and benefit of said property, in violation of Chapter 38, Section 16—1 (d) of the Illinois Revised Statutes, 1963.

The petitioners filed motions which were variously entitled, "Motion to Dismiss" in the case of Somerville and "Motion in the Nature of Double Jeopardy" in the case of Kullerstrand. (Ab. 2-3)

Somerville's Motion reads as follows:

> "1. That your petitioner had been indicted in March, 1964, indictment 64-916 for the crime of theft.
>
> 2. That on November 1, 1965, a jury was selected and sworn to try the issues in indictment 64-916; that on November 2, 1965, the State made a motion to nolle prosse said indictment which was sustained over the objection of your petitioner.

3. That subsequently your petitioner has been indicted for theft in indictment 65-3017.

4. That the only difference between indictment 64-916 and indictment 65-3017 is that the words 'intends to deprive the owner permanently of the use . . . property' have been added to the latter indictment

5. That under our present statute a person commits theft when he knowingly obtains or exerts unauthorized control of property of owner; Chapter 38, Section 16-1(a), Illinois Revised Statutes, 1963; that this is sufficient to charge a defendant with the crime of theft.

6. That it is not essential to constitute the crime of theft under present statute that the defendant intend to deprive the owner permanently of the use or benefiit of the property.

7. That the effect of former prosecution in indictment 64-916 is a bar to prosecution in indictment 65-3017 in accordance with the statute as set out in Chapter 38, Section 3—4(a)(2) and (3)(B)(3).

Wherefore your petitioner prays that he be discharged from the present indictment."

These motions were denied. (Ab. 3)

On appeal, the Appellate Court disposed of the petitioners' contention as follows:

"* * * In this court, the defendants urge:

1) That they were twice put in jeopardy for the same offense;

* * *

"Before us defendants argue that since the trial was commenced under the first indictment [64-916] and a jury impaneled and sworn, the defendants were thereby placed in jeopardy, and consequently the court must discharge them. In their brief defendants state:

> "Sec. 3—4 (a) (3), Chap. 38 states that 'A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution . . . (3) was terminated *improperly* after the jury was impaneled and sworn . . .'" [Emphasis added.]

"In order to have the statute apply, it is necessary that the first prosecution be terminated improperly. In the Notes in Smith-Hurd Annotated Statutes to the section in question, the statement is made:

> "The point at which jeopardy attaches in a jury trial is generally considered to be that at which, in a court of competent jurisdiction and upon a *valid indictment or information,* the defendant has been arraigned and has pleaded, and the jury has been impaneled and sworn." • • •

"Chapter 38, section 16-1, previous quoted in this opinion, states the requirements for an indictment or conviction of theft where the party obtains control over stolen property knowing the property to have been stolen by another. Under the rule laid down in *People* v. *Edge* and *People* v. *Harris, supra,* the first indictment was fatally defective and void. The court ruled properly in denying defendants' motion to discharge defendants at the time of the trial of the second indictment."

Reasons For Granting Writ

The question presented to this court embraces two subsidiary questions which are of great, if not extreme constitutional importance. The first of these subsidiary questions is whether the Fifth Amendment prohibition against double jeopardy is applicable to the states. Over thirty years has passed since the court examined the question in *Palko* v. *Connecticut,* 302 U.S. 319. In *Palko,* the court determined in the narrow context of the statute before it which permitted the state to appeal upon questions of law arising on the trial of criminal cases, that the prohibition against double jeopardy was not of the very essence of a scheme of ordered liberty nor was it a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.

This conclusion was the result of a survey which still found the prohibition against self-incrimination not applicable to the states, nor the injunction against unreasonable search and seizures. Indeed, within a few years, the court would hold that the Sixth Amendment right to counsel was not applicable in every case. *Betts* v. *Brady,* 316 U.S. 455.

Since that time, *Mapp* v. *Ohio,* 367 U.S. 443, has extended the Fourth Amendment protections to state prosecutions; *Gideon* v. *Wainwright,* 372 U.S. 335, has extended the Sixth Amendment right to counsel to all state felony prosecutions; *Malloy* v. *Hogan,* 378 U.S. 1, extended the Fifth Amendment prohibition against self-incrimination to state proceedings and *Robinson* v. *California,* 370 U.S. 660, has made the Eighth Amendment prohibition against cruel and unusual punishments applicable to the states.

The time is now ripe for a re-examination of the question of whether the Fifth Amendment prohibition against double jeopardy is applicable to the states.

This brings us to the second question which is whether the prosecution may, after the jury has been selected and sworn, *nolle prosse* the case because of a claimed invalid indictment and retry the defendant.

In this respect, the opinion of the court below is in direct conflict with a controlling decision of this court.

The Appellate Court reasoned that because the first indictment for theft failed to contain an allegation that the defendants intended to deprive the owner permanently of the use of the property, it did not state all of the elements of the crime of theft and was, therefore, fatally defective.

The Court went on to rule:

> "Where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution."

We submit that the indictment in this case, while defective in that it did not contain an element of the crime charged was not so defective as to deprive the trial court of jurisdiction in the absence of a motion by the defendant to dismiss. The indictment named the offense charged, stated most of the elements and properly alluded to the Code Section violated.

Regardless of the defect in the first indictment, it was constitutionally valid and could support a plea of former jeopardy. The courts of Illinois have consistently held that the purpose of the indictment is to notify the defendant

of the charge he had to meet and to enable him to prepare his defense. *People* v. *Burns,* 403 Ill. 407, 86 N.E.2d 197. The indictment in the first case certainly was sufficient to notify the defendants of the charges they had to meet and to enable them to prepare their defense. Thus, the indictment even if defective under the Criminal Code, could have supported the conviction of the defendants in the event that they waived the requirements of the Code that a charge must set forth the nature and elements of the offense.

This case is controlled by *United States* v. *Ball,* 163 U.S. 662. In that case, the defendant was indicted for the crime of murder. The indictment was defective in that it failed to aver either the time or the place of the death of the deceased. The defendant was tried and acquitted. Thereafter, the United States sought and obtained a new indictment charging him with the same murder. He was convicted. The Supreme Court of the United States reversed. This Court considered the English view that,

> "An acquittal upon an indictment so defective, that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence has generally been considered insufficient to support a plea of former acquittal."

This Court rejected that view. It adopted a dissent by Justice Livingston, then of the New York Court of Appeals in *People* v. *Barrett,* 1 Johns. 66, in which he said,

> "This case, in short, presents the novel and unheard of spectacle, of a public officer whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial,

when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end?" 163 U.S. 662, 667-668.

The Court then went on to say,

"After the full consideration which the importance of the question demands, [the English doctrine] appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict is insufficient in that respect, is a bar to a second indictment for the same killing.

"The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' * * * An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. * * * But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error: and, until so voided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly and he could not be discharged by a writ

> of habeas corpus. * * * If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. * *.* But the fact that the judgment of the court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case." 163 U.S. 662, 669-670.

The ruling in that case may be extended to the instant matter with little difficulty, although here the case did not go to verdict on the first indictment. The key words used by the Supreme Court of the United States are that the first indictment will support a plea of double jeopardy if it be, *"not objected to before the verdict as insufficient."* The defendants by objecting to the mistrial specifically waived any objection which they might have had to the first indictment. By waiving objection, the indictment would stand for all time as not objected to as insufficient. Thus even though the first trial did not go to verdict, the first indictment barred any subsequent prosecution.

The Appellate court in this case failed to distinguish between void convictions and voidable convictions, the distinction drawn by the Supreme Court of the United States in the *Ball* case.

A conviction under the first indictment would not have been void. It would have been merely voidable had the defendants raised the proper objection. In this case the defendant not only did not raise the proper objection but explicitly waived the objection. The provision of Section 114-1 of the Code of Criminal Procedure of 1963, to the effect that an objection to an indictment that it does not charge an offense is not waived by failure to raise it in a motion to dismiss prior to trial concerns itself only with the point in the proceedings at which such an objection may

be raised. The fact that such objection may be raised for the first time by motion in arrest of judgment or on appeal does not support an inference that the objection is one which can never be waived by explicit action of the defendant.

Because a conviction or acquittal on the first indictment would not have been void, the waiver of objection by the defendants to any defects in the indictment cured any such defects and the trial court should have permitted the first trial to proceed after the jury had been selected.

The defendants were placed in jeopardy. They were forced to undergo the considerable expense of two trials and were denied those rights which the prohibitions against double jeopardy were meant to preserve.

Conclusion

For the above and foregoing reasons a Writ of Certiorari ought to issue to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this case.

Respectfully submitted,

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APPENDIX A

Opinion of Appellate Court

MR. JUSTICE MCCORMICK *delivered the Opinion of the Court.*

The defendants, Donald Somerville and Marjorie Kullerstrand, were indicted on November 3, 1965. The indictment charged that on March 24, 1963, they had committed the offense of theft[1] in that they knowingly obtained unauthorized control over stolen property, to wit: $1,300.00 in United States currency t,he property of Zayre of Bridgeview, Inc., knowing the said property to have been stolen by another, and intending to deprive said Zayre of Bridgeview, Inc., permanently of the use and benefit of said property, in violation of chapter 38, section 16-1(d) of the Illinois Revised Statutes (1963).

The case was tried before a jury and a verdict was returned finding defendants guilty. Donald Somerville was sentenced to 2 to 10 years in the penitentiary, and Marjorie

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[1] Ill. Rev. Stat. 1963, ch. 38, § 16-1. *Theft.* A person commits theft when he knowingly:

(d) Obtains control over stolen property knowing the property to have been stolen by another, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Kullerstrand was placed on probation for three years. In this court the defendants urge:

1) That they were twice put in jeopardy for the same offense;

2) That the State improperly suggested the existence of damaging evidence by means of cross-examination, but failed to impeach the denials of the defendants;

3) That the State improperly presented evidence outside the scope of cross-examination impugning the morals of the defendants.

A previous indictment had been returned against the defendants on March 19, 1964, which indictment charged them with committing the offense of theft on March 24, 1963, in that they knowingly obtained unauthorized control over stolen property, to wit: $1,300.00 in United States currency, the property of Zayre of Bridgeview, Inc., knowing the same to have been stolen by another in violation of chapter 38, section 16-1(d), Ill. Rev. Stat. 1963.

A jury trial was commenced on the first indictment and twelve jurors were duly impaneled and sworn on November 1, 1964, after which the trial was continued to the next day. On November 2, the State's Attorney moved for a mistrial and to nolle prosse on the ground that the indictment did not allege a crime and was therefore void. The court granted the State's motion over defendant's objection. A juror was withdrawn from the box and a mistrial declared.

On November 3, 1965, a second indictment was returned, charging the defendants with the offense of theft on March 24, 1963, as set forth above. Defendants were arraigned on the second indictment on November 16, 1965. Thereupon, the defendants filed a motion to dismiss the indictment on

the grounds that they had previously been indicted on March 19, 1964; that a jury was selected and sworn to try the issues; and that "on November 2, 1965 the State made a motion to Nolle Prosse said indictment which was sustained over the objection of your petitioner." The motion further recited: "4. That the only difference between indictment 64-916 and indictment 65-3017 is that the words 'intends to deprive the owner permanently of the use . . . property' have been added to the latter indictment." The court denied the motion.

Before us defendants argue that since the trial was commenced under the first indictment [64-916] and a jury impaneled and sworn, the defendants were thereby placed in jeopardy, and consequently the court must discharge them. In their brief defendants state:

> "Sec. 3-4 (a)(3), Chap. 38 states that 'A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution . . . (3) was terminated *improperly* after the jury was impaneled and sworn . . .'" [Emphasis added.]

In order to have the statute apply it is necessary that the first prosecution be terminated improperly. In the Notes in Smith-Hurd Annotated Statutes to the section in question the statement is made:

> "The point at which jeopardy attaches in a jury trial is generally considered to be that at which, in a court of competent jurisdiction and upon a *valid indictment or information,* the defendant has been arraigned and has pleaded, and the jury has been impaneled and sworn."

In 22 C.J.S. Criminal Law, § 246, it is stated:

> ". . . the general rule is that, in order that jeopardy may attach, there must be a valid indictment, . . . So, where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution . . ."

In *People* v. *Edge,* 406 Ill. 490, the court said at 493:

> "To give a court jurisdiction in a criminal case, it is essential that the indictment or information charge the accused with a crime. (*People* v. *Harris,* 394 Ill. 325; *People* v. *Nickols,* 391 Ill. 565.) Moreover, where the statutory definition of a crime includes the intent with which the act is committed as an element of the offense, the intent must be alleged. (*People* v. *Harris,* 394 Ill. 325; *People* v. *Barnes,* 314 Ill. 140.)"

In *People* v. *Harris,* 394 Ill. 325, 327, the court said:

> "The essential elements of the crime of receiving stolen property as prescribed by section 239 of division I of the Criminal Code (Ill.Rev.Stat. 1945, chap. 38, par. 492) are: (1) that the property has, in fact, been stolen by a person other than the one charged with receiving it; (2) that the one charged with receiving it had actually received the property stolen or aided in concealing it; (3) that the receiver knew that the property was stolen at the time he received it; and (4) that he received the property for his own gain or to prevent the owner from again possessing it.[2] *People* v. *Dalke,* 336 Ill. 446; *People* v. *Prall,* 314 Ill. 518; *People* v. *Ensor,* 310 Ill. 483."

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[2] This section of the then statute is substantially the same as the present one.

The court also said:

> "It has been held that where the statutory definition of a crime includes the intent with which the act was committed as an element of the offense, it is necessary that the intent should be alleged. In *McCutcheon* v. *People,* 69 Ill. 601, it was said: 'Where the intent is mentioned as an element of the offense created by a law, it ought to be alleged; . . .' "

Without such an allegation the court held that the indictment does not set forth a crime as defined by statute. Also see *People* v. *Goffman,* 30 Ill.2d 501.

Chapter 38, section 16-1, previously quoted in this opinion, states the requirements for an indictment or conviction of theft where the party obtains control over stolen property knowing the property to have been stolen by another. Under the rule laid down in *People* v. *Edge* and *People* v. *Harris, supra,* the first indictment was fatally defective and void. The court ruled properly in denying defendants' motion to discharge defendants at the time of the trial of the second indictment.

The State introduced evidence that there was a robbery at Zayre of Bridgeview, Inc.; that about $22,000 was taken, $9,000 of which was dropped in the vestibule and recovered.

Leon Arnold, the State's chief witness, testified that while drinking with one Douglas Aldridge on March 23, 1963, in the early evening he met Eddie Somerville,[3] and that they went to Eddie's home near Blue Island, where they found Paul Langusch, Robert Somerville and his

[3] Eddie Somerville was convicted of armed robbery and the conviction was upheld in this court in *People* v. *Eddie Somerville,* . . . Ill.App.2d .... (No. 51356).

brother, Gail Somerville.[4] Arnold further testified that they later robbed the Zayre store; that the next day Gail Somerville picked up Douglas and Arnold and drove them to the home of defendant Marjorie Kullerstrand, where they saw Robert, Eddie and Donald Somerville and Paul Langusch. At that time Donald Somerville was a police officer in the City of Chicago. Arnold stated that when he was introduced Donald Somerville asked Aldridge how it went and Aldridge said "It was rough." He further testified that Aldridge then asked if any one knew how the man was who was shot and Donald Somerville said he was okay. Arnold testified that they then "gave them what money we had and they put it on a coffee table"; that the money was counted, totaling $13,000, and divided as follows: Arnold, Aldridge, Langusch and Eddie Somerville each received $2,500, and Robert, Gail and Donald Somerville $1,000 each; that Donald said each should give Marjorie Kullerstrand $50 for the use of her home, and that Arnold, Aldridge, Eddie Somerville and Langusch each gave her $50 out of the money received.

The defendants put on certain alibi witnesses. Donald Somerville took the stand and in cross-examination was asked the following question by the Assistant State's Attorney: "Do you know of your own knowledge, Mr. Somerville, if your brother, Robert, was ever a security officer at Zayre's Department Store?" Defendants' counsel objected; the court overruled the objection, and the witness answered, "No, I do not. I wasn't that close to him."

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[4] Robert Somerville, Gail Somerville, and Paul Langusch were previously convicted and their convictions upheld on appeal in *People* v. *Somerville,* 71 Ill.App.2d 381.

In this court the defendants argue that if it was shown that Robert Somerville was in on the planning of the robbery, his employment as a security officer would in a manner tend to corroborate Arnold's testimony. The argument is far-fetched. It is difficult to see why there would be corroboration of Arnold's testimony even if the question had been answered affirmatively. In any case, the witness stated that he did not know, and if the question was in error, it was not an error which would require reversal.

The defendants also contend that the State improperly questioned Virginia Kullerstrand, the daughter of defendant Marjorie Kullerstrand. Virginia had testified that she lived with her mother, and denied that on the date in question she saw six or seven men in the house and denied seeing large sums of money on tables in the house. On cross-examination she testified that Donald Somerville had been to her home several times before March 24, 1963. The State then asked, "Did he ever stay over night at your house?" Defendants' counsel objected and the court overruled the objection, after which defendants moved for a mistrial, which was denied. The witness denied that Donald Somerville had ever stayed over night at her home. The State's Attorney then asked Virginia if she had ever told Officer Walsh that Donald Somerville had stayed over night at their house on numerous occasions. The objection of counsel for defendants was overruled, and Virginia said she did not remember what she had told Officer Walsh. On rebuttal Officer Walsh testified that when he spoke to her on March 4, 1964, Virginia told him that Donald Somerville had spent the night in her home with her mother on numerous occasions. The question had been objected to and the objection overruled.

The defendants here argue that the question was irrelevant and prejudicial. In defendants' brief it is admitted

that if the question were relevant no question could be raised as to its prejudicial effect upon the jury. The defendants also argue that the question was beyond the scope of cross-examination, and again admit that if the question were relevant the objection would fall. The question was relevant.

Both Marjorie Kullerstrand and Donald Somerville had testified that Donald Somerville was not present in her home on March 24, 1963. In *People* v. *McGovern,* 307 Ill. 373, 377, the court said:

> "It is perfectly proper to inquire of a witness, in order to show his bias or prejudice, as to his relations with the accused and his interest in the result of the suit. (1 Wharton on Crim. Evidence,—10th ed.—sec. 477; *Ross* v. *State,* 71 Tex. Crim. 493.) It has been said that the feelings of bias and relationship of the witness are never collateral. (Underhill on Crim. Evidence,—2d ed.—sec. 222.)"

It has been held that the latitude of cross-examination of even the defendant in a criminal case is controlled by the sound discretion of the trial court. *People* v. *Gasior,* 359 Ill. 517. The holding in other jurisdictions is the same. *Parsley* v. *Commonwealth,* 306 S.W. 2d 284.

The ruling of the trial court was proper. Finding no error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

ENGLISH, P. J., and DRUCKER, J., concur.

APPENDIX B

Judgment Order of the Appellate Court of Illinois

The judgments of the Circuit Court of Cook County are affirmed.



SUPREME COURT, U. S.

JUN 22 1968

JOHN F. DAVIS, CLERK

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Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First District.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statutory And Constitutional Provisions

Illinois Constitution, Article 2, Section 10:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Ill. Rev. Stat. ch. 38, Sections 3-3, 3-4:

3-3 Multiple Prosecutions for Same Act:

(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately.

3-4. Effect of Former Prosecution:

A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but

before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

A conviction of an included offense is an acquittal of the offense charged.

(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly under the circumstances stated in Subsection (a), and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the con-

current jurisdiction of this State, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began; or

(3) Was terminated by a final order of judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in this State.

(d) However, a prosecution is not barred within the meaning of this Section 3-4 if the former prosecution:

(1) Was before a court which lacked jurisdiction over the defendant or the offense; or

(2) Was procured by the defendant without the knowledge of the proper prosecuting officer, and with the purpose of avoiding the sentence which otherwise might be imposed; or if subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the defendant was thereby adjudged not guilty.

STATEMENT DENYING PETITIONER'S JURISDICTIONAL ALLEGATION

The Petitioners seek, by writ of certiorari, review of a final state court decision rendered by the Illinois Appellate Court.[1] No federal title, right, privilege, or immu-

1. 88 Ill. App. 2d 212, 232 N.E. 2d 115 (196).

nity was asserted before the Appellate Court. Neither Petitioners' brief nor the Court's opinion mentioned the Fifth or Fourteenth Amendments.[2] Reversal was sought because of purported errors of the trial court in applying state law. The Petitioners, therefore, have improperly invoked Title 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The federal question raised by the petition is whether the Due Process Clause of the Fourteenth Amendment forbids retrial of a state court defendant under a valid indictment after his first trial has been terminated, before any evidence has been heard, because of an indictment so defective as to prevent the state from securing a valid conviction.

REASONS FOR DENYING WRIT

I.

NO WIDELY APPLICABLE RULE COULD EMERGE FROM A CONSIDERATION OF THIS CASE.

In the present case because of an invalid indictment a mistrial was declared after a jury had been impaneled but

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2. Nor had the federal right allegedly violated been asserted in the trial court. It is of no legal significance that the Illinois Supreme Court, in its discretion, denied a petition for leave to appeal. Cf. Beck v. Washington, 369 U.S. 541, 550 (1962) and Ferguson v. Georgia, 365 U.S. 570, 572 n. 1 (1961). The Illinois high court does not grant leave to appeal from Appellate Court decisions to hear claims which petitioners simply did not bother to raise in the Appellate Court. See Ill. Rev. Stat. ch. 110A § 315, 317 (1967). At any rate, for purposes of § 1257 (3) the final state court decision for which the writ is sought is the decision of the Appellate Court.

before any evidence had been heard. This rare combination of circumstances has occurred in no other reported Illinois case [3] and in very few federal cases.[4] It is, therefore, apparent that review of the Illinois Appellate Court's decision could not yield a rule of broad applicability.

II.

A FOURTEENTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY WOULD ADD LITTLE TO THE PROTECTIONS ALREADY AFFORDED STATE COURT DEFENDANTS. RECONSIDERATION OF PALKO V. CONNECTICUT WOULD, THEREFORE, CONSTITUTE AN UNWISE AND AN UNNECESSARY ATTACK UPON THE CONCEPT OF FEDERALISM.

If this Court, exceeding its jurisdictional grant and reaching the federal question not presented to the Illinois Appellate Court, should hold, by way of dictum,[5] that the Fifth Amendment prohibition against double jeopardy is fully applicable to the states, it would not be adding any important new procedural safeguard to the rights already guaranteed to state court defendants. Only three states

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3. Petitioners themselves have deemed this a question "of first impression" in Illinois. Petition to Illinois Supreme Court for Leave to Appeal, 3.

4. The federal cases cited infra at III (B) nearly exhaust the occasions when circumstances even remotely resembling those of this case have occurred in the federal courts.

5. Because the federal concept of double jeopardy was not offended in the instant case [see infra III (B)], any attack upon Palko v. Connecticut, 302 U.S. 319 (1937), would be dictum.

have no constitutional prohibition against double jeopardy. Only a single rarely invoked Connecticut statute materially contravenes the federal notion of double jeopardy.[6]

There has been no showing that the federal rule as to double jeopardy is fairer or more generous than state guarantees. In 1961 the Illinois legislature, for instance, enacted a statute that provides far broader protection against double jeopardy than any the Fifth Amendment provides for federal court defendants.[7] Even a cursory reading of that statute indicates that Illinois prosecutors do not share with federal prosecutors the freedom to use more than one trial in seeking penalties for separate offenses that arose out of the same course of conduct. Likewise, the Illinois prohibition against trial of a citizen in Illinois after he has been in jeopardy for the same conduct before the courts of another sovereign is far in advance of any dictated by the Fifth Amendment. The purported abuses which this Court refused to condemn as a violation of Due process in Ciucci v. Illinois, 356 U.S. 571 (1958), and Bartkus v. Illinois, 359 U.S. 121 (1959), have been rendered unlikely to re-occur by the voluntary action of the Illinois legislature.

In comparison, consider the recent decision of this Court in United States v. Ewell, 383 U.S. 116 (1966), where the federal standard of double jeopardy was held not to have been violated. In that case, it became apparent that a prisoner had been held for two years under a conviction that was invalid because of a defective indictment. The government made no move to free him. The prisoner attacked the legality of his confinement but the

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6. Conn. Gen. Stat. § 54-96 (1960).

7. Ill. Rep. Stat. ch. 38, § 3-3, 3-4 (1967). See Points and Authorities, supra.

government was left free to prosecute him anew and to increase the number of the charges, without giving him any guarantee that he would be given credit for the time he had served under the invalid conviction.

In the instant case the only complaint of the petitioners is that because of an invalid indictment they were forced to go through the jury-selection process twice. We respectfully submit that the reason that the petitioners based their plea in the trial court solely upon the Illinois double jeopardy statute, and in the Appellate Court solely upon that statute and the Illinois Constitution, is that they correctly perceived that Illinois law as to double jeopardy is far more generous to defendants than is the Fifth Amendment standard.

Since a declaration that the Fifth Amendment double jeopardy prohibition is applicable to the States would add so little to the protections already afforded state court defendants, there is no reason to reconsider Palko v. Connecticut, 302 U.S. 319 (1937). On the contrary, the responsibility shown by Illinois and other states in increasing protections against double jeopardy without the compulsion of a federal rule demonstrates the wisdom of that decision. At the very least, Palko, without harming state court defendants, stands as a symbol of the insight of great jurists such as Cardozo and Frankfurter that the ultimate responsibility of improving state systems of criminal justice rests with the States themselves. This Court should not even consider overturning that decision.

III.

THE PETITION PRESENTS NO COLORABLE CONSTITUTIONAL CLAIM.

A. The Petitioners Were Not in Jeopardy During the First Proceeding.

The Illinois Appellate Court held that the petitioners had not been in jeopardy during the proceedings which ended in a mistrial because the indictment had failed to state an offense. This decision was in accord with well established state law: a theft-related complaint or indictment is fatally defective and can be attacked at any time when it fails to allege an intent to deprive or to defraud. People v. Billingsley, 67 Ill. App. 2d 292, 213 N.E. 2d 765 (1966); People v. Greene, —— Ill. App. 2d ——, 235 N.E. 2d 295 (1968).

The Appellate Court implicitly rejected the petitioners' argument, renewed in their petition for certiorari, that despite an indictment that alleged no offense they could confer jurisdiction upon the trial court by waiving the defect.[8] "The trial court is not authorized to convict a person who has not been charged with an offense." People v. Greene, 235 N.E. 2d at 296-97. Illinois courts have long held that "no waiver or consent of the defendant to a criminal prosecution or estoppel against him can confer jurisdiction or authorize his conviction in absence of an accusation charging him with a violation of criminal law."

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8. The argument that the defendant conferred jurisdiction upon the trial court, despite an indictment that charged no offense, by a general objection, without more, to the declaration of a mistrial (A. 24) is extraordinary when uttered by experienced defense counsel.

People v. Minto, 318 Ill. 293, 296 149 N.E. 241 (1925). Since no valid conviction would have been obtained under that indictment, and since the State's motion prevented the possibility of the Petitioners' ever spending a day in jail under the invalid indictment, even if defense counsel had been negligent, the Petitioners were never in jeopardy at their first trial. Their claim of double jeopardy is, therefore, illusory.

B. The Proceedings in this Case Were Consistent With the Fifth Amendment Protection Against Double Jeopardy.

The federal cases with facts most similar to those of the instant case make it clear that according to the Fifth Amendment standard the Petitioners were not placed twice in jeopardy of their liberty. In Wolkoff v. United States, 84 F. 2d 17 (6th Cir. 1936), a mistrial was declared, because of a defective indictment, after all the evidence had been heard but before a verdict had been rendered. Retrial was held not to constitute double jeopardy. In Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946), a mistrial was declared, for the same reason, after the Government's opening statement. After retrial and conviction the Circuit Court affirmed, saying: "One is not in jeopardy because proceeded against under a purported indictment charging no offense." 153 F. 2d at 851.

United States v. Ball, 163 U.S. 662 (1896), is clearly distinguishable. There the Government used the jurisdiction of a faulty indictment to retry a defendant whom a jury had acquitted of murder. We respectfully suggest that the trial court in the present case would have ruled in accordance with Ball if the first trial had proceeded to an acquittal on the merits. Acquittal would have signified that the State had failed to prove at least one of the ma-

terial elements that had to be proved even under a valid indictment. For the second indictment required proof of everything required under the first, plus proof of an intent to deprive. The matter would have been res judicata as between the parties. The State would not have attacked—and would not have been permitted to attack—its own indictment in such a case.

C. Double Jeopardy Is Not A Concept Designed To Prevent the State From Bringing A Defendant To Trial.

Here the State, by a timely motion, sought to prevent a situation where the only possibilities were acquittal or an invalid conviction. The Petitioners, by objecting to a mistrial, sought to force a situation where they were never in jeopardy but, under the Ball decision, could win their freedom. When the Court decided against proceeding so senselessly, Petitioners raised a cry of double jeopardy, claiming that the mistrial was a bar to future prosecution. Due Process does not require so much. As this Court remarked in United States v. Ewell, 383 U.S. at 121, the purpose of the prohibition against double jeopardy is not to grant persons accused of crime "immunity because of legal error committed at a previous trial."

CONCLUSION

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of the Illinois Appellate Court entered in this case.

Respectfully submitted,

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FILED
AUG 31 1968
JOHN F. DAVIS, CLERK

No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1968

DONALD SOMERVILLE and MARJORIE KULLERSTRAND,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First Judicial District.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners properly invoked the jurisdiction of this court under Title 28 U.S.C. §1257(3). In their brief submitted to the Illinois Appellate Court, Appellants urged, as they do here, that having been twice tried for the same offense, their second trial violated the prohibition against double *jeopardy*. Both the United States and Illinois Constitutions speak in these very words. "Nor shall any person be subject for the same offense to be twice put in jeopardy." U.S. Constitution Amendment V. "No per-

son shall * * * be twice put in jeopardy for the same offense." Illinois Constitution, Article 2, Section 10.

Similarly, Point I of petitioners' reply brief stated that, "The jury having been sworn and impaneled, it was double jeopardy to retry the defendants." The entire argument on this point relied on *Downum* v. *United States,* 372 U.S. 734 (1963), in which this Court reversed a forgery conviction while holding defendant's trial violated the Fifth Amendment prohibition against double jeopardy.

While petitioners might have invoked the Federal constitutional guarantee more explicitly than they did, this Court has not denied jurisdiction where an appellant's argument could easily be interpreted as raising a federal question. In *Braniff Airways* v. *Nebraska State Board of Equalization and Assessment,* 347 U.S. 590 (1954) for example, Mr. Justice Reed, speaking for the majority, stated:

> (A)ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented. 74 S.Ct. 757 at 763.

True to this spirit, this Court granted certiorari and decided *Douglas* v. *Alabama,* 380 U.S. 415 (1965). At trial, defendant's attorney objected to the prosecutor reading in open court a convicted witness' confession on the grounds that this reading was not subject to cross-examination. 85 S.Ct. 1074 at 1078 n. 4. The Alabama Appellate Court affirmed defendant's conviction, while holding that he had waived this issue by failing to object repeatedly throughout the reading of the statement. 160 So. 2d 477.

Finding the state procedural ground of decision inadequate, and finding further that a federal question had been raised and preserved, this Court granted certiorari. Defendant's simple assertion before the Alabama trial and appellate forums that the prosecutor's action denied defendant the right to cross-examine was deemed sufficient to have raised a question of the applicability of the Sixth Amendment's confrontation clause to state prosecutions.

Petitioners herein were much more diligent about raising and preserving their federal question than was Douglas. They objected strenuously both at trial and before the Illinois Appellate Court that they had been twice placed in jeopardy, in words closely conforming to those of the Fifth Amendment. Since the issue was decided adversely to petitioners in the Appellate Court and since the Illinois Supreme Court declined to hear the case, petitioners now properly seek review of their convictions by writ of certiorari.

In its brief in opposition to the petition for a writ of certiorari, respondent argues that a reconsideration of *Palko* v. *Connecticut*, 302 U.S. 319 (1937), by this Court would be both unwise and unnecessary. The lack of merit of this contention was made clear during the last term of this Court when certiorari was granted in *Benton* v. *Maryland*, 3 Cr. L. 4103, on the question, "Is the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment."

Recent court opinions illustrate both an anticipation of and a desire for a reappraisal of this question by the Court.

> While the Court has not yet specifically incorporated the double jeopardy clause no deliberate judicial intention to relegate that fundamental safeguard to some inferior status is manifest; rather, protection

> against double jeopardy has been so fiercely guarded as a basic element of our heritage of freedom and its history so closely parallels that of the other basic values already embedded in our conception of due process, that this court is led ineluctably to the conclusion that its current omission from the Supreme Court's ever-lengthening recital of protections within our expanding notions of fundamental fairness is but temporary and indicates only that the judicial process of redefining constitutional philosophy, though in progress, is as yet, incomplete. *State* v. *Fletcher,* 3 Cr. L. 2154 (Ohio Ct. Com. Pleas).

Similarly, in *United States* v. *Nenna,* 282 F. Supp. 754 (1968) Judge Frankel acknowledged that the "situation may be destined for change as petitioners urge in the near future." 282 F.Supp. 754 at 757, affd. 393 F.2d 416 (2d Cir. 1968). Yet after granting that appellant's claim was both "substantial and interesting," the judge decided that this Court, rather than his, would be the appropriate forum for such a change.

The proceedings in this case were patently inconsistent with the Fifth Amendment prohibition against double jeopardy. The federal standard of when jeopardy attaches is set down in *Downum* v. *United States,* 83 S.Ct. 1033 (1963). With the exception of "extraordinary and striking circumstances," jeopardy attaches as soon as the jury is impaneled and sworn. Jeopardy thus attached during the proceedings against petitioner on the first indictment.

It is true that if a trial fails other than on the merits, and the accused does not seasonably object to the dismissal, a second trial for the same offense will not constitute double jeopardy. *Amrine* v. *Tines,* 131 F. 2d 827 (10th Cir. 1942), *Nolan* v. *United States,* 163 F. 2d 768 (8th Cir. 1947). Yet petitioner herein objected strenuously to the termination

of the initial proceedings; accordingly the trial under the second indictment was in clear violation of the Fifth Amendment.

The potentialities for harassment of a person in petitioner's position, if there is no finding of double jeopardy here, are painfully obvious. Whenever the prosecutor, for whatever reason, concludes that the trial is not proceeding as planned, he has but to withdraw a juror and commence a new proceeding. If, on the other hand, the trial is progressing satisfactorily from the prosecution's point of view, he will let it run its course. A clearer violation of the Fifth Amendment double jeopardy clause would be difficult to imagine.

Respectfully submitted,

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